No. 76-1550

In the Supreme Court of the United States

OCTOBER TERM, 1976

JERRY G. MEAGHER, BY AND THROUGH HIS GUARDIAN AD LITEM, DOROTHY O. MEAGHER,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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While on active duty with the United States Navy, petitioner had elective surgery performed at the Naval Regional Medical Center in San Diego to remove a small lipoma located in his arm. Petitioner's guardian instituted this suit in the United States District Court for the Southern District of California under the Federal Tort Claims Act, claiming that petitioner had been injured by the alleged negligence of surgical personnel at the military hospital during the operation. The district court dismissed the suit on the authority of *Feres* v. *United States*, 340 U.S. 135, and the court of appeals affirmed *per curiam* (Pet. App. A).

In *Feres*, this Court held that the government is not liable under the Federal Tort Claims Act for the death or injury of members of the armed forces sustained incident to their service. That principle governs this case. Since there is no conflict regarding its application to active duty servicemen injured during surgical operations performed in military hospitals, this case presents no issue warranting review by this Court.

Although petitioner contends that the "incident to service" standard is "vague and imprecise" (Pet. 13) and should not apply to medical negligence cases (Pet. 27), the courts have consistently ruled that if an operation is performed on an active duty serviceman in a military hospital, any injury to him arises in the course of activity incident to service. See *Alexander* v. *United States*, 500 F. 2d 1 (C.A. 8), certiorari denied, 419 U.S. 1107; *Harten* v. *Coons*, 502 F. 2d 1363, 1365 (C.A. 10), certiorari denied, 420 U.S. 963; *Lowe* v. *United States*, 440 F. 2d 452 (C.A. 5), certiorari denied, 404 U.S. 833; *Shults* v. *United States*, 421 F. 2d 170 (C.A. 5); *Chambers* v. *United States*, 357 F. 2d 224 (C.A. 8); *Buer* v. *United States*, 241 F. 2d 3 (C.A. 7). The Court in *Feres* explicitly made its holding applicable to medical negligence cases (340 U.S. at 136-137), and as the court of appeals stated in *Lowe* v. *United States*, *supra*, 440 F. 2d at 452-453, in barring a suit alleging negligence by military doctors in the performance of elective surgery:

> [I]t is obvious that the [plaintiff] could not have been admitted, and would not have been admitted, to the Naval Hospital except for his military status. He was there treated by Naval medical personnel solely because of that status. It inescapably follows that whatever happened to him in that hospital and during the course of that treatment had to be "in the course of activity incident to service."

Petitioner contends that the exclusion of coverage for servicemen constitutes "arbitrary discriminat[ion]" (Pet. 20). But servicemen do not constitute a "suspect class," and their exclusion from coverage is permissible, so long as it is supported by some "reasonable basis." See *Dandridge* v. *Williams*, 397 U.S. 471, 485-486. This Court recently reiterated that the "distinctively federal" relationship between the government and members of the armed forces, the presence of the Veterans' Benefits Act as a substitute for tort liability, and the "effects of the maintenance of such [tort] suits on [military] discipline" supported the decision by Congress to except military personnel from coverage under the Federal Tort Claims Act.[1] *Stencel Aero Engineering Corp.* v. *United States*, No. 75-321, decided June 9, 1977 (slip op. 5).

Petitioner claims hardship in being denied the type of tort recovery he might have obtained had he not been in military service.[2] But, recognizing the possibility of hardship, this Court said in *Feres* that "if we misinterpret the Act, at least Congress possesses a ready remedy." 340

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[1]While petitioner asserts that "vast changes have occurred within the military" (Pet. 11) which undermine the rationale of the *Feres* doctrine, he fails to explain how the inception of an all-volunteer army, for example, has any bearing on the necessity for military discipline, the soldier's unique relationship to the government, or the functioning of the veterans' compensation statutes. Similarly, petitioner contends that *Feres* has been undercut by decisions recognizing that tort claims may be brought by prisoners and civilians (Pet. 25-26, 29). But these decisions are not inconsistent with the reasoning in *Feres*, which is based upon the special situation of the military relationship and its accompanying compensation scheme, and which this Court recently reaffirmed in *Stencel Aero Engineering Corp.*, *supra*.

[2]The Veterans' Administration advised that petitioner is currently receiving veteran's disability of $1,755.75 per month.

U.S. at 138. *Feres* was decided in 1950, and in the ensuing 26 years, Congress has not changed it.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

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